

DISTRICT OF NEVADA

⁴ ECF No. 51 (objection).

1 **A. Report and recommendation to deny Choate's motion for leave to amend**

2 When a party objects to a magistrate judge's report and recommendation on a dispositive
3 issue, the district court must conduct a de novo review of the challenged findings and
4 recommendations.⁵ The district judge "may accept, reject, or modify, in whole or in part, the
5 findings or recommendations made by the magistrate judge," "receive further evidence," or
6 "recommit the matter to the magistrate judge with instructions."⁶

7 Choate provided the U.S. Marshal with information that Weidick works for CCSD and
8 teaches class at SDCC Monday through Friday from 8 a.m. to 1 p.m.⁷ The U.S. Marshal noted
9 on the service receipt that it was "unable to serve" Weidick at the state prison where he teaches
10 and that CCSD could not accept service on his behalf.⁸ It also noted that Choate needed to
11 obtain Weidick's home address.⁹ Choate hoped to overcome this obstacle by amending his
12 complaint to add claims against CCSD and official-capacity claims against Weidick. Magistrate
13 Judge Albregts determined that Choate's service problem was not a proper reason to amend, and
14 he explained that it is not the court's responsibility to investigate and find a valid service
15 address.¹⁰ Rather, for plaintiffs proceeding in forma pauperis like Choate, the court's assistance
16 extends to directing the U.S. Marshal to "complete service on a properly filled-out summons."¹¹

18 ⁵ Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(B); Local Rule IB 3-2(b) (requiring a district judge
19 to review de novo only the portions of a report and recommendation addressing a case-
dispositive issue that a party objects to).

20 ⁶ 28 U.S.C. § 636(b)(1).

21 ⁷ ECF No. 29 at 1 (service receipt).

22 ⁸ *Id.*

23 ⁹ *Id.*

¹⁰ ECF No. 50 at 2.

¹¹ *Id.*

1 Choate objects, arguing that Judge Albregts is mistaken about the law governing service
2 by the U.S. Marshal under Federal Rule of Civil Procedure 4(c)(3).¹² He insists that the U.S.
3 Marshal must investigate and supply (to the court under seal) Weidick’s home address.¹³ Choate
4 provides several authorities to support his position, but most are from district courts and other
5 circuits, so they are not binding. Choate does provide an on-point Ninth Circuit case—*Puett v.*
6 *Blandford*.¹⁴ In that case, pro se prisoner Puett supplied an address for a defendant who was a
7 member of the Federal Park Police.¹⁵ The U.S. Marshal mailed copies of the summons and
8 complaint to the defendant, who did not acknowledge them.¹⁶ Puett then moved the court to
9 direct the U.S. Marshal to personally serve the defendant at the address he supplied, but the court
10 denied his motion.¹⁷ The court, however, extended the service deadline and directed the Clerk of
11 Court to reissue the summons and deliver it to the U.S. Marshal for service.¹⁸ The Ninth Circuit
12 explained on appeal that the record did not show if the U.S. Marshal actually served the
13 defendant.¹⁹ In any event, the district court ultimately dismissed without prejudice Puett’s
14 claims against that defendant for failing to effectuate service.²⁰

15 The Ninth Circuit reversed, holding that “an incarcerated pro se plaintiff proceeding in
16 forma pauperis is entitled to rely on the U.S. Marshal for service of the summons and complaint,

18 ¹² ECF No. 51 at 3–5.

19 ¹³ ECF No. 51 at 4.

20 ¹⁴ *Id.* (citing *Puett v. Blandford*, 912 F.2d 270 (9th Cir. 1990)).

21 ¹⁵ *Puett*, 912 F.2d at 271.

22 ¹⁶ *Id.*

23 ¹⁷ *Id.* at 272.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 272–73.

1 and, having provided the necessary information to help effectuate service, [a] plaintiff should not
2 be penalized” when the failure to effectuate service is caused by the U.S. Marshal or the court
3 clerk.²¹ It explained that the district court erred when it refused to direct the U.S. Marshal to
4 personally serve the defendant when service by mail proved ineffective.²² And it remanded “so
5 that proper service [could] be effectuated through the U.S. Marshal.”²³

6 Although the district court made a mistake in *Puett*, the Ninth Circuit placed the burden
7 on the plaintiff to provide the information needed to help serve a defendant. It did not remand
8 for the U.S. Marshal to investigate and supply a valid address for the defendant but, rather, to
9 personally serve the defendant at the address that Puett had supplied. Thus, *Puett* does not
10 support Choate’s argument that the U.S. Marshal must find and provide Weidick’s home address.
11 I have not located a case in which the Ninth Circuit held that the U.S. Marshal has a duty to do
12 so.²⁴ So Choate must supply the information needed to help serve Weidick with process. He
13 might obtain this information through a properly issued subpoena duces tecum asking CCSD to
14 provide Weidick’s current or last-known address to the court under seal.

15 Choate also argues that Judge Albregts erred when he determined that the allegations in
16 the proposed fourth amended complaint do not state a plausible First Amendment retaliation or
17 Fourteenth Amendment equal-protection claim against CCSD.²⁵ Choate insists that he states

19 ²¹ *Id.* at 275.

20 ²² *Id.* at 275–76.

21 ²³ *Id.* at 276.

22 ²⁴ *Cf. Walker v. Summer*, 14 F.3d 1415, 1422 (9th Cir. 1994) (holding that the district court did
23 not abuse its discretion in finding that the pro se prisoner plaintiff failed to show cause why his
claim should not be dismissed because the prisoner “did not prove that he provided the marshal
with sufficient information to serve” him).

²⁵ ECF No. 51 at 5.

1 valid claims against CCSD because it employed Weidick, knew through “numerous complaints
2 over [five] years” that he willfully violated the First and Fourteenth Amendments, and failed to
3 correct the issue or improve its teacher training.²⁶ As support, Choate cites an Eleventh Circuit
4 case explaining that a prison warden can be held liable under 42 U.S.C. § 1983 for a
5 subordinate’s violations on the basis of supervisor liability.²⁷

6 But the CCSD is a municipality, not a supervisor, and the law is clear “that a local
7 government may not be sued under § 1983 for an injury inflicted solely by its employees or
8 agents.”²⁸ To state a viable claim against CCSD, Choate must allege true facts to show that his
9 injury occurred because Weidick was acting (1) under an “expressly adopted official policy” of
10 the CCSD or (2) a “longstanding practice or custom” of CCSD, or (3) as a “final policy
11 maker.”²⁹ Choate does not point out how his proposed amended complaint satisfies this
12 standard, and I do not find that it does. So I overrule Choate’s objection on both grounds and
13 adopt Judge Albregts’s report and recommendation in its entirety.

14 **B. Choate’s second motion for leave to amend**

15 While his objection to Judge Albregts’s report and recommendation was pending, Choate
16 filed a second motion seeking leave to amend to add a new claim and new defendants. Choate
17 appears to seek leave to add a conspiracy-to-cover-up claim against unnamed defendants.³⁰ In
18 screening Choate’s operative pleading, I dismissed his conspiracy-to-cover-up claim without
19 prejudice to his ability “to later file a complaint” with that claim “in the event that he loses his

21 ²⁶ *Id.*

22 ²⁷ *Id.* (citing *Valdes v. Crosby*, 450 F.3d 1231 (11th Cir. 2006)).

23 ²⁸ *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

²⁹ *Lytle v. Carl* 382 F.3d 978, 982 (9th Cir. 2004) (internal quotation omitted).

³⁰ ECF No. 52 at 3.

1 age-discrimination claim in this action *because of* such a conspiracy.”³¹ Choate has not lost his
2 claims in this action, so the event that would trigger his ability to file a complaint *in a new action*
3 alleging a conspiracy-to-cover-up claim has not yet come to pass.

4 Choate also moves to add CCSD principal Ann Froby and CCSD as defendants.³² He
5 argues that this amendment will allow CCSD’s attorney to accept service for Weidick.³³ Choate
6 is mistaken in his belief that adding claims against others would authorize the CCSD’s attorney
7 to accept service for Weidick. But even if that trick worked, adding claims against a person or
8 entity for the sole purpose of serving another is not proper reason to sue them.³⁴

9 Conclusion

10 IT IS THEREFORE ORDERED that Choate’s objection [ECF No. 51] to the magistrate
11 judge’s report and recommendation is **OVERRULED, and the report and recommendation**
12 **[ECF No. 50] is ADOPTED in its entirety.**

13 IT IS FURTHER ORDERED Choate’s motions for leave to amend [ECF Nos. 49, 52]
14 **are DENIED.**

15 
16 U.S. District Judge Jennifer A. Dorsey
17 May 4, 2021
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21 ³¹ ECF No. 20 at 10.

22 ³² ECF No. 52 at 3–4.

23 ³³ *Id.* at 3.

³⁴ *See, e.g.,* Fed. R. Civ. P. 11(b)(2)(3) (by signing a pleading, a party represents to the court that the claims asserted are warranted by existing law or nonfrivolous argument for its change and the factual contentions have or will have evidentiary support).